89-86

Supreme Court, U.S.
FILED
JUL 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

PETITION FOR CERTIORARI
IN THE SUPREME COURT OF THE UNITED STATES

NO. _____

October Term, 1989

STATE OF OHIO,

Petitioner

-vs-

RAYMOND HOWARD,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

QUESTION PRESENTED FOR REVIEW

Whether a defendant's right to the effective assistance of counsel on direct appeal as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution is denied when his attorney does not raise an Allen charge issue and (1) at the time of the appeal said charge had never been outlawed by the Ohio Supreme Court; and (2) the charge given to the jury viewed under all circumstances was not coercive or prejudicial.

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POINT I:

REQUIRING COUNSEL ON DIRECT APPEAL TO FORESEE THAT THE OHIO SUPREME COURT WOULD OUTLAW THE USE OF THE ALLEN CHARGE, WHEN THAT COURT HAD NEVER EXPRESSLY FORBIDDEN THE USE OF SUCH CHARGE, IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT WHICH CONSTRUE THE RIGHT TO EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS.

POINT II:

THE PRESUMPTION THAT THE FAILURE TO RAISE THE ALLEN CHARGE ISSUE ON DIRECT APPEAL RESULTS IN PREJUDICE, WHEN THAT CHARGE VIEWED IN ITS ENTIRETY IS NOT COERCIVE, IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT WHICH REQUIRE THAT A DEFENDANT, IN ORDER TO PREVAIL ON A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL, DEMONSTRATE PREJUDICE.

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OPINIONS BELOW

The majority and minority opinions below are reported at 42 Ohio St. 3d 18. They are reproduced and appended hereto as Appendix A. Appendix B consists of the order denying the Petitioner's timely motion for rehearing. Appendix C consists of the opinion of the Court of Appeals of Ohio, Seventh District in State of Ohio -v- Raymond Howard, Mahoning App. No. 86 CA 82 (November 10, 1987), unreported.

JURISDICTION

The judgment of the Court of Appeals of Ohio, Seventh Appellate District, was entered on November 10, 1987, reversing and remanding the Respondent's conviction and ordering a new trial. On April 12, 1989, the Supreme Court of Ohio affirmed the Appellate Court. Thereafter a motion for rehearing was timely filed and on May 17, 1989, that motion was denied by the Supreme Court of the State of Ohio. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI, United States Constitution which provides in pertinent part that:

> . . . in all prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

Amendment XIV, United States Constitution, Section 1, which provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Respondent, Raymond L. Howard, was indicted by the Mahoning County Grand Jury for aggravated murder, a violation of O.R.C. Section 2903.01(A). Following a trial to a jury, the Respondent was found guilty as charged. Prior to their reaching a verdict, the jury was given a supplemental jury instruction. In essence, the supplemental charge was the Allen charge. However, the trial court judge additionally reminded the jury that the burden of proof is on the State to prove the defendant guilty beyond a reasonable doubt.

Following his conviction, the Respondent filed a timely notice of appeal to the Seventh District Court of Appeals, Mahoning County, Ohio. On appeal, his appointed counsel, who was also trial counsel, raised several assignments of error including a speedy trial issue, a prosecutorial misconduct issue, and an accomplice testimony issue.

The Seventh District Court of Appeals affirmed his conviction and the Supreme Court of Ohio denied further leave to appeal on September 14, 1983.

On February 13, 1986, the Respondent, pursuant to Ohio's post-conviction relief statute filed a petition requesting that his sentence be set aside. The basis of his petition was that the trial court erred in giving a supplemental Allen charge. The trial court dismissed the petition.

On appeal to the Ohio Appellate Court, Seventh District, the Respondent's conviction was reversed and remanded for a new trial on the grounds that the use of the supplemental charge constituted plain error and that counsel on direct appeal was ineffective in not raising such an issue.

The Petitioner filed timely notice of appeal to the Supreme Court of Ohio. On April 12, 1989, the Ohio Supreme Court affirmed the Seventh District Court of Appeals judgment in a 5 to 2 decision, appended hereto as Appendix D.

Timely motion for rehearing was filed by the Petitioner and said motion was denied on May 17, 1989.

On June 14, 1989, a stay of execution was granted to the Petitioner pending the filing and disposition of a petition for a writ of certiorari in the United States Supreme Court.

PRESERVATION OF FEDERAL QUESTION

The federal question herein was raised in the motion for a rehearing filed in the Supreme Court of Ohio following the affirmance of the Court of Appeals decision which reversed the Respondent's conviction and remanded the matter for a new trial. In the memorandum in support of the motion for rehearing, the Petitioner argued that there was not a breach of duty owed to the Respondent by his appellate counsel's failure to raise the Allen charge issue on direct appeal and cited the Ohio Supreme Court to the leading federal cases on ineffective assistance of counsel.

The motion for rehearing and the filing of this petition for a writ of certiorari is in response to the Ohio Supreme Court's decision that the Respondent's right to the effective assistance of appellate counsel as guaranteed by the United States Constitution was violated by the giving of an Allen charge. Specifically, the Court stated that failure ". . . by appellee's former counsel to raise this error on direct appeal, for whatever reason, constituted ineffective assistance of counsel, in violation of appellee's rights as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution . . . ." 2 Ohio St. 3d 18, 23. (App. A. at 28).

WHY THE WRIT SHOULD BE GRANTED

POINT I

Requiring counsel on direct appeal to foresee that the Ohio Supreme Court would outlaw the use of the Allen charge, when that Court had never expressly forbidden the use of such charge, is in conflict with applicable decisions of this Court which construe the right to effective assistance of appellate counsel as guaranteed by the Sixth and Fourteenth Amendments.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee not only the right to effective assistance of counsel at trial, but also during the first appeal as of right. See Evitts -v- Lucey, 469 U.S. 387 (1985). In Jones -v- Barnes, this Honorable Court set forth the standard to be used in determining whether or not appellate counsel has been ineffective. 463 U.S. 745 (1983). Basically, Barnes holds that defense counsel does not have a constitutional duty to raise every nonfrivolous issue urged by his client. This Court has recognized that counsel must be afforded a wide range of professional judgment in determining what issues will be raised on appeal. As former Chief Justice Burger wrote, "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Id. at 751 - 52.

Further, a defendant's right to effective appellate representation as guaranteed by the Constitution to the United States does not require that on direct appeal his counsel anticipate any change in the law. Rather, it is his duty to raise issues he feels have a likelihood of success based upon his professional evaluation at the time and place of the direct appeal. See Cervo -v- Fauver, 616 F. 2d 714, 718 (3d Cir. 1980). Thus, in order to satisfy a defendant's constitutional right to effective appellate representation, his counsel must present those issues which at the time of the appeal, in his professional judgment, have the greatest likelihood of success.

This Honorable Court has also recognized that even the best appellate advocate may not foresee a "court's willingness to reconsider a prior holding or will underestimate the likelihood that a federal habeas court will repudiate an established state rule." Smith -v- Murray, 477 U.S. 527, 536 (1986). Nevertheless,

the failure to anticipate such change does not violate counsel's duty to provide effective appellate representation.

Additionally, as this Court stated in the leading case on ineffective assistance of counsel "a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland -v- Washington, 466 U.S. 668, 669 (1984). In essence, this Court emphasizes the importance of deliberate tactical decisions in constructing a direct appeal based upon the law at the time of that appeal.

It is submitted that the decision of the Ohio Supreme Court in the underlying case is in conflict with these established principles. At the time of the direct appeal, the Allen charge had never been modified or outlawed by the Ohio Supreme Court. In State of Ohio -v- Maupin, an Allen-like instruction was upheld by the Ohio

Supreme Court. 42 Ohio St. 2d 473 (1975). Thus, it is submitted that counsel should not have been expected to anticipate that the use of the Allen charge would be outlawed in Ohio, especially in light of the fact that Maupin had upheld the use of an Allen-like charge which was strikingly similar to the charge used by the trial court in this present matter.

The Petitioner respectfully submits that requiring counsel on direct appeal to anticipate changes in the law will encourage future appellants to couch issues which were not raised on direct appeal in terms of ineffective assistance of appellate counsel in order to get a second chance for a review of those issues on the merits. Even more importantly, such a doctrine ignores tactical decisions and professional judgments made by competent counsel.

POINT II

The presumption that the failure to raise the Allen charge issue on direct appeal results in prejudice, when that charge viewed in its entirety is not coercive, is in conflict with applicable decisions of this Court which require that a defendant, in order to prevail on a claim of ineffective assistance of counsel, demonstrate prejudice.

In Lowenfield -v- Phelps, this Honorable Court upheld the use of a supplemental jury instruction which "'in its context and under all the circumstances'" was not improperly coercive. 484 U.S. ____, 98 L. Ed 2d 568, 576 - 577 (1988), citing Jenkins -v- United States, 380 U.S. 445, 446 (1965). In Lowenfield, this Court expressly recognized the continuing validity of Allen. Id. at 577. Additionally, this Court set forth the standard that a supplemental charge must be viewed in its entirety under the circumstances to determine whether or not the jury was improperly coerced.

The Petitioner is not contesting the formulation of the new supplemental jury instruction by the Ohio Supreme Court but rather that the underlying opinion presumes that the

Respondent suffered prejudice by the failure of his counsel to raise the Allen charge issue on direct appeal. In essence, the failure of appellate counsel to foresee that the Ohio Supreme Court would outlaw Allen resulted in a presumption that his client had been prejudiced.

This Court has consistently held that in order to prevail on an ineffective assistance of counsel claim, an aggrieved party must show that the performance of his appellate counsel fell below a reasonable standard of professional judgment and that he suffered prejudice. See Strickland at 687. The burden is on the aggrieved party to demonstrate such prejudice. Clearly, this burden is distinct from a presumption of prejudice due to an unanticipated change in the law.

In her dissenting opinion to the underlying case, Justice Resnick pointed out that "there was proof beyond a reasonable doubt establishing each and every element of the crime charged. In fact, it was not even a close case. Therefore, it cannot be said with certainty that

the jury returned a verdict of guilty, in less than one (1) hour of receiving the modified Allen charge, due to being coerced by the supplemental instruction." 42 Ohio St. 3d 18, 29. (App. A. at 50-51).

The underlying decision not only requires appellate counsel to anticipate changes in the law but then presumes the resulting prejudice. It is submitted that the underlying decision is in direct conflict with Strickland and its progeny. Further, such decision ignores any tactical strategy of appellate counsel in structuring a direct appeal, especially as the supplemental instruction given in this case was not coercive when viewed under all the circumstances.

The Petitioner respectfully submits that review should be granted to determine whether in light of Strickland and its progeny, appellate counsel has the constitutional duty to raise the issue of a supplemental jury instruction that is not coercive and whether the Ohio Supreme Court

in outlawing such a supplemental charge can then presume prejudice sufficient enough to establish an ineffective assistance of counsel claim.

CONCLUSION

This Court should grant certiorari and the judgment below should be reversed.

Respectfully submitted

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CERTIFICATE OF SERVICE

Three copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of Ohio has been sent by 1st class mail (postage prepaid), to Randall M. Dana, Ohio Public Defender, and Robert L. Lane, Chief Appellate Counsel, Ohio Public Defender Commission, 8 East Long Street, Columbus, OH 43266-0587, this 14 day of July, 1989.

Kathi L. McNabb

KATHI L. MCNABB
Assistant Prosecutor

Counsel for Petitioner

DATE: 7/14/89

Supreme Court, U.S.
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APPENDIX A

STATE OF OHIO V. HOWARD

42 Ohio St. 3d 18 (1989)

APPEAL from the Court of Appeals for Mahoning County, No. 86 CA 82.

On January 21, 1981, Raymond L. Howard, appellee herein, was indicted by the Mahoning County Grand Jury for the aggravated murder of Glenn Howard Frank in violation of R.C. 2903.01(A). Kathy Ortenzio was also named in the indictment; however, this appeal does not include her.

After extensive pre-trial maneuvering, appellee went to trial on July 20, 1981. Following six days of testimony, final argument was heard and jury instructions were given on July 29, 1981.

Late in the afternoon of July 29, 1981, the court received a statement from the jury indicating that the jury was unable to reach a unanimous verdict on the aggravated murder charge. With consent of both counsel, the trial

judge entered the jury room and gave a supplemental charge, reiterating that the jurors must each decide the case for themselves but that they should consider the opinions of fellow jurors.(1)

Shortly after receiving the supplemental instruction, the jury recessed for the evening. Deliberations continued on July 30 and well into the afternoon of July 31 without a verdict being returned. At approximately 3:00 p.m. on July 31, 1981, the court again received a note from the jury indicating that a unanimous verdict could not be reached on the aggravated murder charge. The trial judge, in chambers, informed counsel that he intended to give the jury a charge "*** short of the Allen charge, but nonetheless one which does a little bit more than encourage them to decide this case." Appellee's counsel objected to this proposed supplemental instruction.

The jury was returned to the courtroom for purposes of receiving a second supplemental instruction. The text of this instruction, and the subject of this appeal, are as follows:

"THE COURT: You have transmitted to the Court, ladies and gentlemen, a statement; that after lengthly [sic] discussion, you cannot reach a unanimous verdict on the charge of aggravated murder, and you asked me for further instructions. Everybody associated with this case realizes that it's a most difficult, indeed, matter to decide.

"Now the only method that is provided by our Constitution and our Laws, ladies and gentlemen, for deciding questions of fact is by a verdict of a jury. And in a large proportion of cases and strictly speaking in all cases, absolute certainty cannot be obtained or even expected. Although the verdict to which a juror agrees must be, of course, his own verdict, the result of his own convictions and not a mere acquiescence in the conclusion of his fellows; yet, in order to bring 12 minds to a unanimous

verdict you must examine the question submitted to you with candor and with a proper regard in defference [sic] to the opinions of each other. If you should fail to agree upon a verdict, the case is left open and undecided. Like all cases, this case must be disposed of sometime. You, ladies and gentlemen, were selected in the same manner and from the same source from which any future jury must be, and there is no reason to suppose that the case will ever be submitted to 12 more men and women who are more intelligent, more impartial or more competent to dispose of it, or that more or clearer evidence will be produced on one side or the other. You have heard the evidence. Now with this view, it is your duty, ladies and gentlemen, to dispose of the case if you can consciously [sic] do so. In order to make a decision more practicable, the law imposes the burden of proof on one party or the other. In all cases that is true. Now in this case the burden is upon the State to establish every part of every essential element, of which you are well aware, beyond a reasonable

doubt. Now if you are left in doubt, ladies and gentlemen, as to any essential element, the defendant is entitled to the benefit of that doubt. But in conferring together, ladies and gentlemen, you ought to pay proper respect to each other's opinions; you must listen with a disposition to be convinced by each others' arguments. And on the one hand, if much the larger number of your panel are on one side or the other, a dissenting juror should consider whether his position is a reasonable one when it makes no impression upon the minds of men and women equally honest, equally intelligent and who have heard the same evidence with the same attention, with an equal desire to arrive at the truth and under the sanction of the same oath. And on the other hand, if a majority have reached a verdict, the minority ought seriously ask themselves whether or not they may reasonably and ought not to doubt the correctness of the judgment which is not concurred in with most of those with whom they are associated

and/or distrust the weight or sufficiency of that evidence which fails to convince the minds of their fellows.

"Now with these instructions in mind, ladies and gentlemen, you will please return to your deliberation room and continue your deliberations."

At 3:20 p.m., the jury retired to deliberate further. Barely one hour later, the jury returned with a verdict of guilty to the aggravated murder charge.(2)

On appeal, appellee's conviction was affirmed by the court of appeals. On October 5, 1983, this court denied appellee's motion for leave to appeal.

Subsequently, appellee filed a petition for post-conviction relief pursuant to R.C. 2953.21, claiming ineffective assistance of counsel. The state filed a motion to dismiss the petition. The motion to dismiss was granted by the Court of Common Pleas of Mahoning County on May 13, 1986. Appellee again appealed to the Court of Appeals for Mahoning County.

On appeal, the court held that the supplemental instruction given by the trial judge to the jury on July 31, 1981 "*** so coerced and infected the process of jury deliberation so jealously revered in the law, that it constituted prejudicial error affecting *** [appellee's] substantial rights to a fair and impartial jury and cannot be allowed to stand." Consequently, the court found that appellee's counsel failed to raise this issue on direct appeal and this failure constituted ineffective assistance of counsel. As a result, the conviction was reversed and the cause remanded for new trial.

The cause is now before this court upon the allowance of the state's motion to certify the record.

DOUGLAS, J. The sole issue before this court is whether the supplemental jury instruction given to the jury on July 31, 1981 was coercive in the sense that it pressured members of the jury who were in the minority to abandon their positions. The essential question becomes

whether the supplemental instruction given to the jury by the trial judge, known as the Allen charge, is allowed in Ohio.

The Allen charge or "dynamite" charge, as it is also known, arises from Allen v. United States (1896), 164 U.S. 492. In Allen, the United States Supreme Court set forth a summary of the supplemental instruction given by the trial court:

"*** [A]lthough the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally

intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.***" Allen, supra, at 501.

This is, in essence, what the supplemental jury instruction in the case before us stated. In fact, the complete language of the supplemental instruction given by the judge in Allen is nearly, though not exactly, the same as the language of the supplemental instruction given in this case.(3)

Although the trial judge gave a supplemental charge to the jury that substantially conformed to the traditional Allen charge, it is

clear that Ohio has neither adopted nor rejected the Allen charge as a proper supplemental instruction. As we stated in State v. Maupin (1975), 42 Ohio St. 2d 473, 484, 71 O.O. 2d 485, 491, 330 N.E. 2d 708, 715, "*** the original Allen charge has never been a part of Ohio jurisprudence." We now directly meet the issue and find that the trial judge's supplemental instruction was improper.

The Allen charge has long been the subject of criticism from legal scholars.(4) The brunt of this criticism is directed at the potentially coercive impact the language of the Allen charge can have on a jury. The criticism centers on the effect of language advising the jury that a decision must be reached, thereby depriving either the state or the defendant of the possibility of a hung jury and a mistrial. In addition, and of particular importance to this court, is the criticism that the Allen charge is unduly coercive to members of the jury in the minority because it, in effect, orders those members to reevaluate their position in light of

the fact that fellow jurors are unswayed, but does not require jurors in the majority to undertake a corresponding reevaluation. The effect of this charge is to place the authority of the trial judge behind the position of the majority. This, potentially, creates a force that few dissenting jurors can resist. It subtly changes the requirement that the jury verdict be unanimous to one more closely resembling majority rule.

The criticism of the Allen charge has not fallen on deaf ears. Many jurisdicitons have either modified the Allen charge or abandoned it entirely because, as the state of Arizona concluded in abandoning Allen, in State v. Thomas (1959), 86 Ariz. 161, 166, 342 P. 2d 197, 200, "*** the evils far outweigh the benefits ***" of continuing its use. Other jurisdictions abandoning or modifying the Allen charge are the District of Columbia in Winters v. United States (D.C. App. 1974), 317 A. 2d 530, Colorado in Taylor v. People (1971), 176 Colo. 316, 490

P. 2d 292, and California in People v. Gainer (1977), 19 Cal. 3d 835, 139 Cal. Rptr. 861, 566 P. 2d 997.(5)

In addition to the foregoing states that have acted to abandon or modify the Allen charge, several federal courts have taken the same steps. Using supervisory power over courts within their circuits, federal courts of appeals have prohibted use of the Allen charge, to the extent that it tends to coerce jurors in the minority to defer to those in the majority, in United States v. Silvern (C.A. 7, 1973), 484 F. 2d 879, United States v. Thomas (C.A.D.C. 1971), 449 F. 2d 1177, and United States v. Fioravanti (C.A. 3, 1969), 412 F. 2d 407. Other circuits have limited the use of Allen charges. See United States v. Scott (C.A. 6, 1977), 547 F. 2d 334, and United States v. Angiulo (C.A. 1, 1973), 485 F. 2d 37.

In short, we firmly position ourselves with those jurisdictions that have abandoned the traditional Allen charge.(6) Our reasoning today echoes the criticism of the Allen charge

voiced by this court in Maupin, supra, at 483, 71 O.O. 2d at 490, 330 N.E. 2d at 715, where we stated:

"*** The principle [sic] and most frequent reason advanced [for rejecting the Allen charge] is that it lacks balance, that the thrust of the Allen instruction is directed to the minority jurors only and is potentially coercive upon them to agree with those jurors constituting the majority." (Citations omitted.)

Accordingly, since we find that the use of the Allen charge was improper, we agree with the court of appeals that failure by appellee's former counsel to raise this error on direct appeal, for whatever reason, constituted ineffective assistance of counsel, in violation of appellee's rights as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Section 10, Article I of the Ohio Constitution. Certainly the facts of this case, where only one hour after the Allen charge was given, a unanimous verdict was reached when nearly two and one-half days of deliberation had

failed to produce agreement, raise at least the inference of coercion affecting appellee's substantial right to a fair and impartial jury. "The test in determining if the accused had effective retained counsel is whether the accused, under all the circumstances, including the fact that he had retained counsel, had a fair trial and substantial justice was done." State v. Hester (1976), 45 Ohio St. 2d 71, 74 O.O. 2d 156, 341 N.E. 2d 304, paragraph four of the syllabus. We agree with the court of appeals that substantial justice was not accorded to the appellee herein and that his case should be remanded to the trial court for a new trial.

Though we have determined that the use of the traditional Allen charge is improper, our duty is not yet complete. We would be remiss in our responsibility of supervising lower courts if we did not provide a supplemental instruction that, in our opinion, avoids the pitfalls of the traditional Allen charge.

In formulating such an instruction, we are cognizant of several conflicting considerations. On one hand, a supplemental instruction must not be coercive by stressing that the jury must reach a verdict, a clear misstatement of law.(7) On the other hand, the instruction must allow the trial judge to remind the jury of the reason a jury is assembled, namely, to reach a unanimous decison if each juror can conscientiously agree to a verdict.

Finally, and most significant to our decison, the supplemental instruction must be balanced and neutral. It cannot, like Allen, single out jurors in the minority and urge them to reconsider their position. To be balanced, it must urge jurors in the majority to do the same.

Several approaches have been taken by jurisdictions in moving away from the traditional Allen charge. The most popular approach has been to adopt the standard proposed in the American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relat-

ing to Trial by Jury (1968) 145-146, Standard 5.4. First proposed in 1968, the most recent version of the ABA standard is found in 3 American Bar Association Standards for Criminal Justice (2 Ed. 1986) 15-133. The ABA standard reads:

"Standard 15-4.4. Length of deliberations; deadlocked jury

"(a) Before the jury retires for deliberation, the court may give an instruction which informs the jury:

"(i) that in order to return a verdict, each juror must agree thereto[;]

"(ii) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;

"(iii) that each juror must decide the case for himself or herself but only after an impartial consideration of the evidence with the other jurors;

"(iv) that in the course of deliberations, a juror should not hesitate to reexamine his or her own views and change an opinion if the juror is convinced it is erroneous; and

"(v) that no juror should surrender his or her honest conviction as to the weight or effect of the evidence solely because of the opinion of the other jurors, or for the mere purpose of returning a verdict.

"(b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in paragraph (a). The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

"(c) The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement."

The ABA also recommends, as complying with this standard, Instruction 8.11 found in Mathes, Jury Instructions and Forms for Federal Criminal Cases (1961), 27 F.R.D. 39, 97-98. See 3 American Bar Association Standards for Criminal Justice (2 Ed. 1986) 15-134. The recommended instruction reads:

"The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

"It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is eroneous. But do not surrender your honest conviction as to the weight

or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

"You are not partisans. You are judges - judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case."

A large number of states have abandoned the Allen charge by adopting the ABA standard. From California, in People v. Gainer, supra, to New Jersey, in State v. Czachor (1980), 82 N.J. 392, 413 A. 2d 593, states are disapproving of the Allen charge due to its coercive potential.(8)

While we likewise disapprove of the traditional Allen charge, we do not believe the ABA standard is the answer. Though we would not disapprove of its use, we believe a standard that more emphatically encourages the jury to reach a decision, if they can conscientiously do so, is preferable.

In searching for the proper balance in a supplemental instruction, we agree with United States v. Johnson (C.A.D.C. 1970), 432 F. 2d

626, 633, that the ABA standard is in reality a modified Allen charge. The major area of difference between the ABA standard and the traditional Allen charge is that the ABA standard does not require jurors in the minority to reconsider their opinions out of deference owed to the majority. We agree that jurors in the minority should not be singled out as being required to rethink their position; to our mind this is the most objectionable aspect of the traditional Allen charge. We search now for a "modified" Allen charge that eliminates this aspect while still encouraging a verdict, if a verdict can be conscientiously reached.

In promulgating a supplemental instruction to be used by this state's trial courts in situations where it is appropriate, we are mindful of our two stated goals. It must encourage a verdict where one can conscientiously be reached. In addition, the instruction must be balanced, asking all jurors to reconsider their opinions in light of the fact that others do not agree. This even-handed treatment of all jurors

would stand in contrast to the traditional Allen charge, as we noted in Maupin, supra, at 484, 71 O.O. 2d at 491, 330 N.E. 2d at 715.

Toward this end we propose a supplemental instruction that uses portions of the Allen charge language while ratifying the principle of neutrality contained in the ABA standard. In place of the traditional Allen charge, we approve the following supplemental instruction:

"The principal mode, provided by our Constitution and laws, for deciding questions of fact in criminal cases, is by jury verdict. In a large proportion of cases, absolute certainty cannot be attained or expected. Although the verdict must reflect the verdict of each individual juror and not mere acquisescence in the conclusion of your fellows, each question submitted to you should be examined with proper regard and deference to the opinions of others. You should consider it desireable that the case be decided. You are selected in the same manner, and from the same source, as any future jury would be. There is no reason to believe

the case will ever be submitted to a jury more capable, impartial, or intelligent than this one. Likewise, there is no reason to believe that more or clearer evidence will be produced by either side. It is your duty to decide the case, if you can conscientiously do so. You should listen to one another's arguments with a disposition to be persuaded. Do not hesitate to reexamine your views and change your position if you are convinced it is erroneous. If there is disagreement, all jurors should reexamine their positions, given that a unanimous verdict has not been reached. Jurors for acquittal should consider whether their doubt is reasonable, considering that it is not shared by others, equally honest, who have heard the same evidence, with the same desire to arrive at the truth, and under the same oath. Likewise, jurors for conviction should ask themselves whether they might not reasonably doubt the correctness of a judgment not concurred in by all other jurors."

It is of interesting historical note to consider that in Allen, supra, at 501, the United States Supreme Court affirmed a supplemental instruction that was "*** taken literally from a charge in a criminal case which was approved of by the Supreme Court of Massachusetts in Commonwealth v. Tuey [(1851), 62 Mass. 1], 8 Cush. 1 ***." The Massachusetts court subsequently reconsidered the position it had taken in Tuey and, in Commonwealth v. Rodriquez (1973), 364 Mass. 87, 300 N.E. 2d 192, adopted a modified supplemental instruction that is similar to the instruction we adopt today.

In conclusion, we hold that the traditional Allen chage is not a proper supplemental charge to be given to juries in Ohio which have become deadlocked on the question of conviction or acquittal. Further, we reiterate that the supplemental instruction given by the trial judge in this case was improper and that appellee was denied effective assistance of counsel when the issue was not raised on appeal. Therefore, we affirm the judgment of the court of appeals

granting post-conviction relief and remand this case for a new trial. Our judgment shall have only prospective effect.

Judgment affirmed and cause remanded.

MOYER, C. J., SWEENEY, WRIGHT and H. BROWN, J. J., concur.

HOLMES, J., dissents.

RESNICK, J., dissents with opinion.

ALICE ROBIE RESNICK, J., dissenting. I respectfully dissent from the majority's holding. On January 13, 1988 the United States Supreme Court considered this issue in Lowenfield v. Phelps (1988), 484 U.S. ___, ___, 98 L. Ed. 2d 568, 576-577, 108 S. Ct. 546, 550, and held that when considered "in *** context and under all the circumstances," the two jury polls and the supplemental charge did not impermissibly coerce the jury to return a death sentence. The supplemental charge in Lowenfield

was similar to the traditional Allen charge long approved by that court on the ground that it was an attempt to secure jury unanimity.

The majority has considered the supplemental instruction here without addressing "all the circumstances" which must be considered before the so-called Allen charge can be termed coercive and thus reversible error.

Appellee, Raymond L. Howard, was convicted by a jury of aggravated murder in violation of R.C. 2903.01(A) on July 31, 1981. Appellee's trial counsel was appointed to also represent him in the direct appeal. On May 9, 1983, the court of appeals affirmed the judgment of the trial court. In that appeal the supplemental instruction to which a general objection had been made was not raised as error or considered by the appellate court. A motion for leave to appeal to this court from the decision of the appellate court was denied on September 14, 1983 (case No. 83-1042).

Appellee, pro se, filed a petition for post-conviction relief on April 8, 1985. This petition was withdrawn apparently because appellee chose instead to seek a writ of habeas corpus in this court. However, on December 26, 1985, this court dismissed such writ without consideration on the merits (case No. 85-1121). Appellee subsequently filed a second petition for post-conviction relief on February 13, 1986 alleging that appellee's trial counsel was ineffective prior to, during, and on appeal, for various reasons.

This case presents a troublesome question which frequently occurs in appellate courts: Should the issue of ineffectiveness of counsel be raised, sua sponte, by the appellate court on direct appeal, when the same attorney represents the accused both at trial and on appeal so that this issue can be addressed in a timely manner?

In the case before us, more than five years had elapsed before the question of ineffective trial counsel was brought to the attention of a court. The better practice would be to require

appellate courts to consider the entire record with a view to issues involving ineffectiveness of counsel when the same attorney represents the accused both at trial and on appeal. If error is then found, it can be treated in a timely manner and not, as here, after eight years have elapsed causing retrial to be almost impossible.

The trial judge in this case, at the request of the accused, had the petition for post-conviction relief reassigned to another judge for dispostion. The newly assigned judge issued findings of fact and conclusions of law on May 13, 1986, which detemined that counsel was not ineffective in that his tactics were those of trial strategy. The judge further found that the supplemental charge to the jury was not coercive. Appellee appealed the decision to the court of appeals. On November 12, 1987, the appellate court, in a two-to-one opinion, reversed the decision of the trial court and granted appellee's petition for post-conviction relief, finding that the trial court's modified Allen charge was clearly

directed to the minority jurors, thus holding that the charge was coercive and that counsel was ineffective in that he did not raise this issue on direct appeal.

In Lowenfield, supra, at ___, 98 L. Ed. 2d at 579, 108 St. Ct. at 552, the United States Supreme Court noted when faced with a lack of an ojection under similar circumstances that:

"We are mindful that the jury returned with its verdict soon after receiving the supplemental instruction, and that this suggests the possibility of coercion. United States Gypsum Co., supra, [438 U.S.], at 462, 57 L. Ed. 2d 854, 98 S. Ct. 2864. We note, however, that defense counsel did not object to either the polls or the supplemental instruction. We do not suggest that petitioner thereby waived this issue, Wainwright v. Witt, 469 U.S. 412, 431, n. 11, 83 L. Ed. 2d 841, 105 S. Ct. 844 (1985), but we think such an omission indicates that the potential for coercion argued now was not apparent to

one on the spot.*** Id. at 430-431, 83 L. Ed. 2d 841, 105 S. Ct. 844, and n. 11." (Emphasis added and footnote omitted.)

The court found that the lack of an objection from counsel who was present at the time of the giving of the supplemental instruction does not necessarily indicate coercion in the charge. In the instant case trial counsel entered a general objection but then did not raise the supplemental instruction as error on appeal. Considering all the circumstances of this case, it could be concluded that counsel did not believe the supplemental charge given caused the jury to reach its ultimate verdict of guilty. Hence the supplemental charge was not coercive.

After a thorough review of case law in this area it becomes apparent that the mere giving of an Allen-type charge should not result in reversal of the conviction unless it can be shown based upon all circumstances that the jury was coerced in arriving at its verdict solely due to the supplemental jury instruction.

The Lowenfield court further stated at ___, 98 L. Ed. 2d at 576-577, 108 S. Ct. at 550:

"Our review of petitioner's contention that the jury was improperly coerced requires that we consider the supplemental charge given by the trial court 'in its context and under all the circumstances.' Jenkins v. United States, 380 U.S. 445, 446, 13 L. Ed. 2d 957, 85 S. Ct. 1059 (1965) (per curiam). The use of a supplemental charge has long been sanctioned. Nearly a century ago in Allen v. United States, 164 U.S. 492, 41 L. Ed. 528, 17 S. Ct. 154 (1896), this Court reviewed a charge similar but by no means identical to that given to the Louisiana jury here, and concluded that it was not reversible error even within the federal system."

In numerous cases where trial courts have given a supplemental jury instruction containing language similar to that in this case which directs dissenting or minority jurors to reconsider their positions, courts have found, in its context and under all the circumstances that the instruction was not prejudicially coercive. See

State v. Maupin (1975), 42 Ohio St. 2d 473, 71 O.O. 2d 485, 330 N.E. 2d 708; Commonwealth v. Rodriquez (1973), 364 Mass. 87, 300 N.E. 2d 192; United States v. Burke (C.A. 2, 1983), 700 F. 2d 70, certiorari denied (1983), 464 U.S. 816 (supplementary charge not set out); Unites States v. Fioravanti (C.A. 3, 1969), 412 F. 2d 407, certiorari denied sub nom. Panaccione v. United States (1969), 396 U.S. 837; United States v. Sawyers (C.A. 4, 1970), 423 F. 2d 1335, 1342-1343 ("[A]ppropriate use of the pure Allen charge [given when jury indicates that it is dead-locked] is not per se reversible error. Even so, we strongly recommend use of a modified version of Allen that ***" mentions duty of majority to listen and consider any minority viewpoint and does not direct a juror to distrust his own judgment if he finds a large majority of jurors taking a view different from his own.); United States v. Kelly (C.A. 5, 1986), 783 F. 2d 575, certiorari denied (1986), 479 U.S. 889; United States v. Silvern (C.A. 7, 1973), 484 F. 2d 879 (en banc) (requires

prospective use of ABA-approved standard supplementary Allen-type instruction); United States v. Brown (C.A. 7, 1969), 411 F. 2d 930; United States v. McKinney (C.A. 10, 1987), 822 F. 2d 946; United States v. Rey (C.A. 11, 1987), 811 F. 2d 1453, certiorari denied (1987), 484 U.S. ___, 98 L. Ed. 2d 63, 108 S. Ct. 103; Fulwood v. United States (C.A. D.C. 1966), 369 F. 2d 960, certiorari denied (1967), 387 U.S. 934.

Today, the majority approves of a modified supplemental instruction similar to that adopted by the Supreme Judicial Court of Massachusetts in Commonwealth v. Rodriquez (1973), 364 Mass. 87, 300 N.E. 2d 192. In Rodriquez the Massachusetts court amended the charge it had approved in Commonwealth v. Tuey (1851), 62 Mass. 1, 8 Cush. 1. These amendments, however, were, in the interests of the better administration of criminal justice, to apply to future cases. Rodriquez, supra, at 98, 300 N.E. 2d at 200. The Rodriquez court held that the defendant's exception to the terms, timing, and setting of the giving of the "Tuey" charge fails "*** be-

cause our decided cases have held the Tuey language to be nonprejudicial, and we do not find enough in the circumstances of its use here to render it coercive to the point of calling for reversal of the judgments. ***" (Emphasis added.) Id.

A nearly identical charge to the one before us and to the one deemed nonprejudicial in Rodriquez was given by the trial court and reviewed by this court in State v. Maupin, supra, at 482-483, 71 O.O. 2d 485, 490-491, 330 N.E. 2d 708, 714-715, fn. 3. This court held that the supplemental instruction was not prejudicially coercive and, under the circumstances, the court's giving of the charge was not an abuse of discretion. Id. There, the court was notified by the jury that it was having difficulty reaching an agreement after deliberations of approximately two and one-half hours. The court gave an Allen charge, the jury retired to further deliberate, and returned with a verdict of guilty in less than one-half hours. Id. at 477, 71 O.O. 2d at 487, 330 N.E. 2d at

711-712. There were no other circumstances present with the potential of coercion of the jury. Id. at paragraph four of the syllabus. Cf. State v. Sabbah (1982), 13 Ohio App. 3d 124, 13 OBR 155, 468 N.E. 2d 718.

Similarly, in this case, a supplemental charge was given when the jury indicated to the court that it was having difficulty reaching a unanimous verdict as to the aggravated murder charge after several hours of deliberations. The jury then retired to deliberate further. Subsequently a modified Allen charge was given after the jury again indicated difficulties following nearly two additional days of deliberations. As in Maupin, no inquiry was made as to the numerical division of the jury. Upon retiring, the jury returned with its verdict in approximately one hour, a longer period of further deliberations than in the Maupin case and many of the other cases previously cited.

In conclusion, I do not find that the trial court committed reversible error by giving the modified Allen charge in this case. The use of

such a charge did not constitute reversible error in and of itself. The entire charge which was given must be considered, not simply a portion thereof. The trial judge did in fact remind the jurors that the burden of proof was upon the state to prove each and every element of the crime beyond a reasonable doubt. Further, he told them if they are in doubt, the defendant is entitled to the benefit of that doubt. In addition he told them that the verdict "to which a juror agrees must be, of course, his own verdict." It cannot be presumed that any juror was coerced into agreeing to the guilty verdict solely due to the modified Allen charge. State v. Moon (1911), 20 Idaho 202, 117 P. 757.

After a thorough review of the record in this case, I find that there was proof beyond a reasonable doubt establishing each and every element of the crime charged. In fact it was not even a close case. Therefore, it cannot be said with certainty that the jury returned a verdict of guilty, in less than one hour from

receiving the modified Allen charge, due to being coerced by that supplemental instruction. I do not find that the appellee's constitutional rights have been violated, and hence the giving of this supplemental charge was not reversible error.

I would, therefore, reverse the judgment of the court of appeals and reinstate the conviction.

FOOTNOTES

1

This first supplemental charge was essentially the same as the charge in State v. Maupin (1975), 42 Ohio St. 2d 473, 71 O.O. 2d 485, 330 N.E. 2d 708. The pertinent part of the judge's supplemental instruction was:

"Now ladies and gentlemen, I have told you this before, and you are all intelligent human beings, and I hesitate to repeat it but I'm going to anyway. I told you, ladies and gentlemen, to consult with each other and consider each other's opinions and views and deliberate with an attempt to reaching an agreement, of course, if you can do so without disturbing your individual judgment. Each of you must decide this case for yourself, but you should do so only after a thorough consideration of the case with your fellow jurors. Now, don't hesitate to change your opinion if, within reason, you are convinced that it is wrong. I'm going to give you a little more time and I'll be back in a little bit to ask you if you want to continue to deliberate or if you want to quit for the evening. I would urge you to continue, however, at this point."

2

A verdict sheet, finding appellee guilty of aggravated murder and signed by all members of the jury, was time-stamped and filed with the Clerk of Mahoning County Court of Common Pleas. The verdict was filed at 4:26 p.m. on July 31, 1981.

3

The pertinent text of the supplemental instruction in Allen, supra, reads as follows:

"'The only mode provided by our Constitution and laws for deciding questions of fact in criminal cases is by the verdict of a jury. In a large proportion of cases, and perhaps, strictly speaking, in all cases, absolute certainty can not be attained or expected. Al-

though the verdict to which a juror agrees must, of course, be his own verdict, the result of his own convictions, and not a mere acqui[e]s[c]ence in the conclusion of his fellows, yet, in order to bring twelve minds to a unanimous result, you must examine the questions submitted to you with candor, and with a proper regard and deference to the opinions of each other. You should consider that the case must, at some time, be decided; that you are selected in the same manner, and from the same source from which any future jury must be; and there is no reason to suppose that the case will ever be submitted to twelve men more intelligent, more impartial, or more competent to decide it; or that more or clearer evidence will be produced on the one side or the other. And with this view it is your duty to decide the case if you can conscientiously do so. In order to make a decision more practicable the law imposes the burden of proof on one party or the other in all cases.' In the present case the burden of proof is upon the Government of the United States. 'But in conferring together you ought to pay proper respect to each other's opinions, and listen, with a disposition to be convinced, to each other's arguments. And, on the one hand, if much the larger number of your panel are for a conviction, a dissenting juror should consider whether a doubt in his own mind is a reasonable one which makes no impression upon the the [sic] minds of so many men, equally honest, equally intelligent with himself, and who have heard the same evidence with the same attention, with an equal desire to arrive at the truth, and under the sanction of the same oath. And, on the other hand, if a majority are for acquittal, the minority ought seriously to ask themselves whether they may not reasonably, and ought not to, doubt the correctness of a judgment which is not concurred in by most of those with whom they are associated, and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows.'"

Brief for United States at 29, Allen v. United States, reprinted in Briefs and Records of the United States Supreme Court, Part V.

This charge to the jury was omitted in printing the transcript of record of the Allen case. See Briefs and Records of the United States Supreme Court, Part V, Allen v. United States, Record at 127; Brief for United States at 2. However, the charge was reprinted in the brief of the United States, filed with the Clerk of the Supreme Court of the United States on October 21, 1896. See Brief for United States, supra, at 29.

4

See Note, Deadlocked Juries and Dynamite: A Critical Look at the "Allen Charge" (1964), 31 U. Chi. L. Rev. 386; Hennessey, The Allen Charge; Dead Law a Long Time Dying (1972), 6 U.S.F.L. Rev. 326; Note, The Allen Charge: Recurring Problems and Recent Developments (1972), 47 N.Y.U.L. Rev. 296, 316-317; Marcus, The Allen Instruction in Criminal Cases: Is the Dynamite Charge About to be Permanently Defused? (1978), 43 Mo. L. Rev. 613; O'Sullivan, Deadlocked Juries and the Allen Charge (1985), 37 Me. L. Rev. 167.

5

For a more complete list of jurisdictions that have abandoned or modified the Allen charge, see Annotation (1980), 97 A.L.R. 3d 96.

6

We are not unmindful that the United States Supreme Court still views Allen as good law. "The continuing validity of this Court's observations in Allen are beyond dispute ***." Lowenfield v. Phelps (1988), 484 U.S. ___, ___, 98 L. Ed. 2d 568, 577, 108 S. Ct. 546, 551. However, close scrutiny of the charge given in Lowenfield reveals that it was not the traditional Allen charge. The charge did not speak specifically to minority jurors. Id. at ___, 98 L. Ed. 2d at 575, 108 S. Ct. at 549.

7

The trial judge in the case at bar went even further than the traditional Allen charge. When giving the second supplemental instruction, the judge said, "If you should fail to agree upon a verdict, the case is left open and undecided. Like all cases, this case must be disposed of sometime. ***"

8

See Annotation (1980), 97 A.L.R. 3d 96, for a more complete listing of states.

APPENDIX B

THE SUPREME COURT OF OHIO

1989 TERM

To wit: May 17, 1989

STATE OF OHIO	)	Case No. 87-2154
	)	
APPELLANT	)	
	)	
-v-	)	REHEARING ENTRY
	)	
RAYMOND L. HOWARD	)	(Mahoning County)
	)	
APPELLEE	)	

IT IS ORDERED by the Court that rehearing in this case be and the same is hereby, denied.

(Court of Appeals No. 86 CA 82)

ss:
THOMAS J. MOYER
Chief Justice

APPENDIX C

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. CA 82
PLAINTIFF-APPELLEE	)	
	)	
-v-	)	OPINION
	)	
RAYMOND L. HOWARD	)	
	)	
DEFENDANT-APPELLANT	)	

O'NEILL, J.

This is a timely appeal from a judgment of the Mahoning County Court of Common Pleas which sustained the State's motion to dismiss appellant's petition for post conviction relief.

Appellant, Raymond L. Howard, was indicted by the Mahoning County Grand Jury for aggravated murder pursuant to R.C. 2903.01(A). Appellant was represented by counsel throughout discovery and his subsequent trial which commenced on July 20, 1981. After an extensive trial, the jury returned a verdict of guilty as charged and

judgment was thereafter entered upon the verdict. Appellant then filed a timely notice of appeal to this court.

Appellant was again represented by counsel during the direct appeal. This court subsequently affirmed appellant's conviction (State -v- Howard [CA 7, 1983] Case No. 81 CA 109, unreported). Further leave to appeal was denied on July 5, 1983, by the Ohio Supreme Court.

On February 13, 1986, appellant filed a petition for post conviction relief pursuant to R.C. 2953.21. Appellant's grounds for relief were posited upon a claim of ineffective assistance of counsel. By judgment entry of May 13, 1986, the trial court filed its findings of fact and conclusions of law and sustained a motion to dismiss filed by the State of Ohio.

A timely notice of appeal was filed from the trial court's judgment entry on May 23, 1986.

While much of appellant's argument concerns his claim of ineffective assistance of counsel, both at trial and on direct appeal, the sole and

determinative issue which underlies this claim is whether the trial court's use of the supplemental "Allen" or "dynamite charge" constitutes plain error requiring a reversal.

The term "Allen charge" derives from Allen -v- United States (1896), 164 U.S. 492, in which a supplemental instruction regarding the jurors' duties in attempting to reach a verdict was approved. The "Allen charge" read:

> "* * * although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority."

In State -v- Maupin (1975), 42 Ohio St. 2d 473, the Ohio Supreme Court noted, "* * * the original Allen charge has never been a part of Ohio jurisprudence." Maupin, supra, at 484. The court's reasons for so finding were based upon what it perceived to be increasing criticism warranting a rejection of the charge as given in Allen.

> "The principal and most frequent reason advanced is that it lacks balance; that the thrust of the Allen instruction is directed to the minority jurors only and is potentially coercive upon them to agree with those jurors constituting the majority. * * *.
>
> "The second difficulty judicially noted with Allen arises from modification and variations, with resultant appeals, in language utilized by trial courts which either omits parts of the Allen charge which tend to avoid any coercive effect or the utilization of language which has the effect of enhancing its potential for coercion. * * *." Maupin, supra at 483.

The Maupin court went on to uphold the particular supplemental charge at issue therein as it found that charge bore little resemblance to the pure "Allen charge." It found the particular charge noncoercive as it was directed to all the jurors, and hence neutral, rather than

being directed to a minority. Additionally, the court also found the supplemental charge to have been given in close proximity to the general charge such that each juror heard the repeated refrain to consult with each other and consider each other's views, but without disturbing or surrendering their individual convictions or judgment. Nonetheless, a different result is warranted in the case sub judice.

In the instant case, appellant was tried for aggravated murder. Trial commenced on July 20, 1981; the jury received the case for deliberations on July 29, 1981; the jury returned a guilty verdict on July 31, 1981. No issue has been raised regarding the trial court's general charge to the jury, and, upon our review of that charge, we believe none would have been warranted.

Before a luncheon break on the first day of deliberations, the jury posed three questions to the court to clarify the court's initial in-

structions on the elements of aggravated murder. Near the end of the first day the jury sent a note to the court stating:

> "Cannot reach unanimous decision on first charge (aggravated murder) and doubtful if more deliberation will change that." (Tr. 1399; 1408).

With the approval of appellant's counsel, the judge entered the jury room with the court reporter, reinstructed the jury on how to proceed before considering the lesser offense of murder, rendered what is in essence an acceptable supplemental charge per Maupin, supra, and urged the jurors to continue deliberations. (Tr. 1399-1400).

Within thirty minutes, though the record is unclear whether the trial court re-entered the jury room or summoned the jury out, the court interrupted the deliberations, inquired whether the jury would reach a verdict within 20-30 minutes, and then decided to adjourn for the day (Tr. 1400-140).

The transcript of proceedings indicates there were no further questions or requests for additional instruction from the jury throughout its deliberations on July 30, and throughout the morning and most of the afternoon of July 31, 1981. Nonetheless, by its journal entry of August 3, 1981, the trial court found the jury had deliberated on July 28, 29, 30 and reached its verdict of guilty on July 31, 1981.

On July 31, 1981, at 3:10 P.M., the court stated it had received several other questions from the jury and a statement which read:

> "After lengthy discussion we cannot reach a unanimous verdict on the charge of aggravated murder. Please advise of further instructions." (Tr. 1402; 1408).

The court then stated:

> "* * * I have decided to bring the jury into the courtroom and read to them a charge, in my opinion, short of the Allen charge, but nonetheless one which does a little bit more than encourage them to decide this case." (Tr. 1402) (Emphasis added.)

Appellant's counsel entered a general objection. Nonetheless, the court read the following charge to the jury:

"* * * And in a large proportion of cases and strictly speaking in all cases, absolute certainty cannot be obtained or even expected. Although the verdict to which a juror agrees must be, of course, his own verdict, the result of his own convictions and not a mere acquiescence in the conclusion of his fellows; yet, in order to bring 12 minds to a unanimous verdict you must examine the question submitted to you with candor and with a proper regard in deference to the opinions of each other. If you should fail to agree upon a verdict, the case is left open and undecided. Like all cases, this case must be disposed of sometime. You, ladies and gentlemen, were selected in the same manner and from the same source from which any future jury must be, and there is no reason to suppose that the case will ever be submitted to 12 more men and women who are more intelligent, more impartial or more competent to dispose of it, or that more or clearer evidence will be produced on one side or the other. You have heard the evidence. Now with this view, it is your duty, ladies and gentlemen, to dispose of the case if you can consciously do so. In order to make a decision more practicable, the law imposes the burden of proof on one party or the other. In all cases that is true. Now in this case the burden is upon the State to establish every part of every essential element, or which you are well aware, beyond a reasonable doubt. Now if you are left in doubt, ladies and gentlemen, as to any essential element, the defendant is entitled to the benefit of that doubt. But in conferring together, ladies and gentlemen, you ought to pay proper respect to each others' opinions; you must listen with a disposition to be convinced by each others' arguments. And on the one hand, if much the larger number

of your panels are on one side or the other, a dissenting juror should consider whether his position is a reasonable one when it makes no impression upon the minds of men and women equally honest, equally intelligent and who have heard the same evidence with the same attention, with an equal desire to arrive at the truth and under the sanction of the same oath. And on the other hand, if a majority have reached a verdict, the minority ought seriously ask themselves whether or not they may reasonably and ought not to doubt the correctness of the judgment which is not concurred in with most of those with whom they are associated and/or distrust the weight or sufficiency of that evidence which fails to convince the minds of their fellows.

"Now with these instructions in mind, ladies and gentlemen, you will please return to your deliberation room and continue your deliberations." (Tr. 1403-1405). (Emphasis added.).

This final transcript of proceedings entry ended with the jury being returned to deliberations at 3:20 p.m. on July 31, 1981 (Tr. 1405). Appellant contends the jury returned and rendered its verdict of guilty of aggravated murder against him within forty minutes. Obviously, the transcript of proceedings is inconclusive on this assertion. However, the record does otherwise indicate that the jury's verdict form, signed by all of the jurors, was filed with the

clerk on July 31, 1981 at 4:26 p.m.; little more than one hour after the final supplemental charge in issue.

Unlike Maupin, supra, we find the supplemental charge in issue to mirror the very evils complained of in that court's rejection of the "Allen charge." In the case sub judice, the trial court's supposedly modified "Allen charge" was clearly directed to the minority jurors. It matters not whether the minority was for or against conviction or acquittal; it is enough that the process of jury deliberations was coerced by the court.

Unlike Maupin, supra, we cannot rely upon either the trial court's initial charge, or its first supplemental charge in the jury room near the end of the first day of deliberation, to cleanse or minimize the prejudicial effect of its "Allen charge." The second supplemental charge in issue lacked the neutrality of the Maupin charge; it lacked the repeated cautioning of the Maupin charge for the jurors to stand by

their honestly held convictions; and it lacks the closeness in time to the general charge which was a factor in the Maupin decision.

In Maupin the jury was charged regarding drug law violations, received the case for deliberations at 11:40 a.m., and was given the supplemental charge complained of therein, within four hours.

Here, the jury was instructed initially on aggravated murder and its elements, murder and its elements, the defense of alibi, a plethora of instructions regarding burdens of proof, reasonable doubt and the mechanics of deliberations and reaching a verdict. In short, the jury in the instant case received a detailed and protracted instruction and, as appears from their several questions to the court, struggled to digest it and balance it along with the facts of the case which took eight days to present. One full day of deliberations intervened between the general charge and the first supplemental charge in the jury room. Another two days of deliberations passed between this short, first

supplemental charge and the "Allen Charge" complained of herein. Hence, we find the time between the charges given to be too remote and attenuated to in any way minimize the prejudicial effect of the objected to charge.

Moreover, it is this very same great span of time between the general charge and the prejudicial "Allen charge," and the then very short span of time between the prejudicial charge and the verdict, which further evidences the truly prejudicial effect of the "Allen charge" in issue. Finding no Ohio case on point, we have reviewed the case of People -v- Richards (1968), 95 Ill. App. 2d 430, 237 N.E. 2d 848, and adopt its rationale.

In that case, the defendant was charged with attempted robbery. At the conclusion of the trial, the jury was charged by the court. The jury deliberated for two and one-half hours before being summoned back to court. Upon inquiry from the bench, the foreman informed the court the jury was hopelessly deadlocked. The court then gave the jury an "Allen" type sup-

plemental charge over defendant's objection. The jury then returned to deliberations and, after only eighteen additional minutes, found defendant guilty as charged.

In reversing defendant's conviction and remanding the case for a new trial, the Illinois Appellate Court did so solely upon the basis of the prejudicial effect of that trial court's "Allen charge" and without otherwise finding it necessary to balance the error against the facts of that case to determine whether such was prejudicial error.

> "We cannot dissuade ourselves from the position that this supplemental instruction as given * * * was the singularly procuring factor occasioning the verdict returned. We would furthermore consider it a practice in naivete by our court to accede unhesitatingly to the palpable vice of this oft criticized "dynamite charge" (a term used to categorize its blasting effect upon the jury), under the circumstances as they exist here. * * * Lest we are to abandon the safeguards inherent in unanimity of jury verdicts in this State, in the final analysis the question must always be whether the recitation of the words of this supplemental charge, or its equal, in the court's estimation, adversely affected independent jury deliberation and thinking." Richards, 237 N.E. 2d at 852.

> "We are of the opinion that an inference of such coercion upon the minority juror arises, simply by virtue, of the marked brevity of deliberation following the delivery of the charge.
>
> " * * *.
>
> "Under such circumstances, the use of the 'Allen type' charge must be deemed to have been tantamount to an exercise of judicially sanctioned undue influence or coercion upon the jury which the law cannot condone." Richards, supra, at 853.

In again comparing the issue of the case sub judice with Maupin, supra, we note an additional basis for finding the "Allen charge" in issue to be prejudicial error. The clear import and language of the objected to charge went even further awry in that it urged the minority jurors to go so far as to disregard or distrust the weight and sufficiency of the evidence they had relied upon simply because the majority disagreed with its import.

In State -v- Sabbah (1982), 14 Ohio App. 3d 124, the court considered a defendant's appeal based upon, among other claimed errors, the trial court's use of an "Allen charge." Sabbah, supra, is factually distinguishable from the in-

stant case only in that the jury there was more explicit in informing that court it could not reach a verdict. Nonetheless, noting that the "Allen charge" had been rejected in Ohio on the authority of Maupin, supra the Sabbah court held:

> "The additional fact that the court gave no neutral supplementary instruction only enhanced the coercive effect of the other circumstances. Even if the jury had not articulated its inability to reach a fair verdict, we must conclude that in the absence of the appropriate supplementary instructions for situations such as this, the trial court's statements unnecessarily and prejudicially exacerbated the potential for coercion." Sabbah, supra, at 139.

Accordingly, and for all the reasons stated, we find the trial court's second supplemental charge not to be a "modified" Allen charge," but in fact a charge that went even beyond the evils complained of in the "Allen charge." Hence, it did, as the trial court stated it was intended to do, a little bit more than just encourage the jury to decide the case. However, in doing so, it so coerced and infected the process of jury deliberation so jealously

revered in the law, that it constituted prejudicial error affecting appellant's substantial rights to a fair and impartial jury and cannot be allowed to stand.

Holding as we do, we further find appellant's counsel should have raised the issue on direct appeal and the failure to do so constitutes ineffective assistance of counsel.

The constitutional right under the Sixth Amendment of the United States Constitution "to have the assistance of counsel for his defense," which has been made obligatory upon the States by the Fourteenth Amendment of the United States Constitution, implies adequate representation by efficient counsel and efficiency of counsel implies skill and preparation in endeavoring to produce the desired result; and where the record demonstrates that such legal representation was not provided to defendant by his counsel, then the defendant has been deprived of his constitutional rights to due process and assistance of counsel as guaranteed to him by the Sixth and Fourteenth Amendments of the United States Con-

stitution, and by Sections 10 and 16 of Article I of the Constitution of the State of Ohio. State -v- Cutcher (1969), 17 Ohio App. 2d 107. Balancing the rights of the accused and of the public, the test is whether the accused, under all the circumstances including the fact that he had counsel, had a fair trial and substantial justice was done. State -v- Hester (1976), 45 Ohio St. 2d 71, paragraph 4 of the syllabus.

The error which we have previously considered to have intervened in the trial judge's instructions can only be classified as substantial error interfering with substantial justice. The jury in this case, on July 29, 1981, informed the trial court that it could not reach a unanimous decision and that it was doubtful if more deliberation would change that. The jury continued to deliberate on July 30, 1981 and throughout the morning and most of the afternoon of July 31, 1981. Again, on July 31, 1981, the jury informed the court that a unanimous decision could not be reached. The period of deliberations and the statements of the jury ob-

viate a conclusion that there was no resistance amongst the members of the jury to reach a verdict of guilty. Obviously, the erroneous charge of the trial court influenced the verdict finally returned by the jury. The trial counsel objected. The error was so grievous that it should have been raised on direct appeal and could have been raised on direct appeal for the reason that it appeared as part of the original record. The failure to raise it denied the petitioner substantial justice to the extent that if the error had been raised upon direct appeal, very obviously, the judgment of the trial court would have been reversed.

For all reasons stated, the judgment of the trial court sustaining the State of Ohio's motion to dismiss appellant's petition is reversed. Appellant's petition for post conviction relief is hereby granted, his conviction upon the jury verdict is reversed and the cause is remanded for a new trial.

Cox, P. J., concurs.

Donofrio, J., dissents. See dissenting opinion.

Approved:

ss: _____
JUDGE

DONOFRIO, JR., DISSENTING

I respectfully dissent from the majority opinion in this matter for the following reason.

The United States Supreme Court has approved the "Allen charge," as such. No case has been brought to our attention wherein the Ohio Supreme Court has said that a charge is exactly that as the Allen charge and, therefore, it is erroneous and prejudicial.

In State -v- Maupin, cited by the majority in this court, there is some dicta and a statement that the Allen charge has never been a part of Ohio jurisprudence, but neither has the Supreme Court spoken on a particular charge as being too coercive. The court discusses the Allen charge as having been criticized because of

a lack of balance. The court, then, in Maupin proceeded to uphold a charge that was used therein as not being coercive.

I find that the trial court's charge in the instant case is sufficiently balanced and, therefore, not prejudicial. The trial court stated, as part of its instructions, at transcript 1403 to 1405, as follows:

> "* * * Now in this case the burden is upon the State to establish every part of every essential element * * * beyond a reasonable doubt. Now if you are left in doubt, ladies and gentlemen, as to any essential element, the defendant is entitled to the benefit of that doubt."

He emphasized twice the fact that appellant is entitled to the benefit of a doubt, and that it was the State's burden to prove and establish every part of every element beyond a reasonable doubt. The judge did not use the term that if the majority were for conviction or if the majority were for acquittal. He stated the following:

> "* * * (T)he defendant is entitled to the benefit of that doubt. But in conferring together, ladies and gentlemen, you ought to pay proper respect to each others' opinions; you must listen with a disposition to be convinced by each others' ar-

guments. And on the one hand, if much the larger number of your panel are on one side or the other, a dissenting juror should consider whether his position is a reasonable one when it makes no impression upon the minds of men and women equally honest, equally intelligent and who have heard the same evidence with the same attention, with an equal desire to arrive at the truth and under the sanction of the same oath. And on the other hand, if a majority have reached a verdict, the minority ought seriously ask themselves whether or not they may reasonably and ought not to doubt the correctness of the judgment which is not concurred in with most of those with whom they are associated and/or distrust the weight or sufficiency of that evidence which fails to convince the minds of their fellows." (Tr. 1404-1405.)

The United States Supreme Court stated in Allen, supra, at 501-502:

"While, undoubtedly, the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury-room. The very object of the jury system is to secure unanimity by a comparsion of views, and by arguments among the jurors themselves. It certainly cannot be the law that each juror should not listen with deference to the arguments and with a distrust of his own judgment, if he finds a large majority of the jury taking a different view of the case from what he does himself. It cannot be that each juror should go to the jury-room with a blind determination that the verdict shall represent his opinion of the case at that moment; or, that he should close his ears

> to the arguments of men who are equally honest and intelligent as himself. There was no error in these instructions."

Essentially, then, the trial judge was asking the jurors to consider the collective wisdom of his or her fellow jurymen. Considering the trial judge's emphasis as to the presumption of innocence and the duty of the prosecutor to prove every essential element beyond a reasonable doubt, I find, therefore, that the instruction by the trial judge was sufficiently balanced to be non-prejudicial.

I would, therefore, affirm the judgment of the trial court.

APPROVED:

ss:
JOSEPH DONOFRIO, JUDGE

APPENDIX D

THE SUPREME COURT OF OHIO

1989 TERM

To wit: April 12, 1989

STATE OF OHIO	)	Case No. 87-2154
	)	
APPELLANT	)	
	)	
-v-	)	JUDGMENT ENTRY
	)	
RAYMOND L. HOWARD	)	APPEAL FROM THE
	)	COURT OF APPEALS
APPELLEE	)	

This cause, here on appeal from the Court of Appeals for Mahoning County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed and the cause is remanded consistent with the opinion rendered herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; and that a mandate be sent to the Court of Common Pleas for Mahoning County to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Mahoning County for entry.

(Court of Appeals No. 86 CA 82)

ss:

THOMAS J. MOYER
Chief Justice

CERTIFICATE OF SERVICE

Three copies of the foregoing Appendix has been sent by 1st class mail (postage prepaid), to Randall M. Dana, Ohio Public Defender, and Robert L. Lane, Chief Appellate Counsel, Ohio Public Defender Commission, 8 East Long Street, Columbus, OH 43266-0587, this 14 day of July, 1989.

Kathi L McNabb

KATHI L. MCNABB
Assistant Prosecutor

Counsel for Petitioner

DATE: 7/14/89